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SUPREME COURT OF THE UNITED STATES

CASE NO. 76-600

GEORGE ROMAN DRESKE,

Petitioner,

v.

JAMES D. HOLT,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PRELIMINARY STATEMENT

Petitioner was the Petitioner and Appellant in the respective lower courts, the United States District Court for the Southern District of Florida and the United States Fifth Circuit Court of Appeals, Respondent was the Respondent and Appellee.

Parties will be referred to in his brief as they appear before this Court.

OPINIONS BELOW

Respondent accepts Petitioner's statement of the opinions below, but notes additionally that the opinion of the Fourth District Court of Appeal of the State of Florida on Petitioner's direct appeal may be found at 301 So.2d 131 (4DCA Fla. 1974). Respondent further notes that Petitioner sought review by certiorari in the Supreme Court of the State of Florida. His petition for a writ of certiorari was denied at 314 So.2d 582 (Fla. 1975).

JURISDICTION

Respondent agrees with Petitioner's contention that this Court is authorized under 28 U.S.C. 1254(1) to review by certiorari decisions of federal appellate

courts. However, Respondent offers several reasons why this Court should not consider this cause on its merits. These reasons are set forth in the Argument portion of this brief. Inasmuch as they may also be viewed as jurisdictional in nature, Respondent hereby incorporates these reasons as a part of this jurisdictional statement.

QUESTION PRESENTED

A. Whether the issue Petitioner seeks to raise is properly before this Court?

B. Whether Petitioner's locking himself in his car and refusing to submit to arrest is constitutionally protected conduct? (Restated)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent concedes that Petitioner has correctly stated the language of the

constitutional and statutory provisions he cites.

STATEMENT OF THE CASE

Respondent accepts much of Petitioner's Statement of the Case, but notes the following exceptions and additions.

(1) Petitioner was stopped for exceeding the speed limit in Martin County, Florida. He was asked for his driver's license and responded that he did not have it with him. He was told at that time that if he posted an appearance bond in cash or traveler's checks for the offenses of driving without a license and exceeding the speed limit,there would be no need to proceed to the sheriff's office. Petitioner told the trooper that he did not have the money. He was then told that he would have to proceed to the Martin County Sheriff's Office.

(2) Petitioner told the trooper that he would not go to the Martin County Sheriff's Office, inasmuch as he did not want to go back in the direction from which he came. The trooper then informed him that he was under arrest and would be required to follow the trooper to the Martin County Sheriff's Office.

(3) While the trooper was writing citations, Petitioner ran to his car and started the motor. The trooper told him once again that he would have to proceed to the Martin County Sheriff's Office, noting additionally that Petitioner's wife would have to drive since Petitioner did not have a driver's license with him. The trooper also told Petitioner to turn off the motor and Petitioner did so. In light of Petitioner's unusual conduct, the trooper radioed for a backup, in accordance with the

required police procedure.

(4) As the trooper continued to write the citations, Petitioner told him that he would proceed in the direction he was traveling and get off the highway at the Ft. Pierce exit and go to the Ft. Pierce County Sheriff's Office. The trooper explained to him that the matter would have to be handled in the county in which the offense occurred, Martin County. Petitioner did not express any fear of turning around on the highway, nor did he offer to drive to the next exit in order to reverse direction without crossing the median strip. Rather, he merely stated that he would not go back in the direction from which he came but that he would continue in the same direction to the Ft. Pierce County Sheriff's Office.

(5) Upon being told that the procedure

he sought to follow was not acceptable, Petitioner stated that he would not go anywhere and locked himself in his car with his wife.

(6) A second trooper then arrived on the scene. He conferred with the first trooper and then he also informed Petitioner that he was under arrest. Petitioner smiled in response. When Petitioner was then asked to roll down the window, he shook his head in a negative fashion.

(7) Approximately eight minutes after the second trooper arrived on the scene, a third trooper arrived. It was only upon the arrival of the third trooper, approximately 23 minutes after the initial stop and Petitioner's initial refusal to accompany the trooper, that the troopers positioned their cars in a manner which prevented Petitioner's car from being driven.

(8) After the cars were so positioned, Petitioner was once again informed that he was under arrest and told that if he did not get out of the car, the troopers would employ lawful means of getting him out. Once again, Petitioner's only response was a smile.

(9) It was only after the above circumstances that the troopers sought to force Petitioner from his car. This action was undertaken in disregard of the orders of the troopers' supervisor and apparently consisted of prying open a vent window and spraying mace into the car. Petitioner emerged from the car and a physical confrontation ensued. There is conflicting testimony as to whether this confrontation was initiated by Petitioner or by the troopers.

ARGUMENT

Petitioner seeks review by certiorari of a decision of United States Court of Appeals for the Fifth Circuit affirming an order of the United States District Court for the Southern District of Florida which dismissed Petitioner's petition for writ of habeas corpus. Respondent asserts that this court should not consider the issue Petitioner seeks to raise.

Petitioner asks this Court to adopt his contention that his conduct was "intended to resist the unlawful and unreasonable demands of a police officer (Petition for a Writ of Certiorari, p. 2)," and was therefore constitutionally protected. However, this contention was not presented to any State court, nor was it presented in the petition for writ of habeas corpus. Respondent submits that either of these

factors is a sufficient basis for the conclusion that this Court should not consider the issue.

It is well-settled that in order to obtain federal habeas corpus review, a petitioner must first exhaust all state remedies. Fay v. Noia, 372 U.S. 391(1963); Picard v. Connor, 404 U.S. 270(1971). Petitioner appealed his judgment and sentence to the Florida Fourth District Court of Appeal. He raised six issues on this direct appeal. Petitioner's "Statement of Points Involved on Appeal" set forth these points and is reproduced in the Appendix to this brief. These points include the sufficiency of the evidence and the jury instructions, the procedure followed in amending the information filed against Petitioner, the prosecution's closing argument, the severity of the sen-

tence, and the constitutionality of the statute under which Petitioner was charged with resisting arrest. The issue Petitioner seeks to raise before this Court was not presented.

It was not presented in the petition for writ of habeas corpus either.

As Judge Atkins of the district court noted in the order dismissing the original petition:

> "As grounds for relief Petitioner alleges that:
> 1. Florida Statute §843.02 is unconstitutional on its face.
> 2. Florida Statute §843.02 is unconstitutional in its application due to the alleged insufficiency of evidence presented at trial.
> 3. The prosecutor's closing argument violated Petitioner's Federal Constitutional rights.
> 4. The information was amended the day before trial."
>
> Petitioner's Appendix to Petition for a Writ of Certiorari, p. 2.

Thus the first time Petitioner raised the argument he now seeks to advance was on appeal of the dismissal of his petition for a writ of habeas corpus.

Respondent contends that these circumstances bar consideration of the issue by this Court. Petitioner's failure to exhaust state remedies precludes habeas corpus relief. Had the issue that is now being raised been asserted in the original petition, its inclusion would have resulted in the petition's dismissal without consideration of the merits. Burroughs v. Wainwright, 454 F.2d 1165 (5th Cir. 1972). To consider the issue at this point, in a proceeding arising from the dismissal of the original petition, would be contrary to the requirements for consideration of an issue by a federal court.

Further, Petitioner's failure to

present this issue to the district court should preclude its consideration here. Any review of the decision of the district court must be limited to those matters on which it ruled. Young v. Wainwright, 326 F.2d 255 (5th Cir. 1964); Anderson v. Texas, 507 F.2d 105 (5th Cir. 1975). Since the district court did not rule on the assertions Petitioner now sets forth, it cannot be said that the district court erred even if Petitioner's arguments are considered to be valid.

It can be concluded that Petitioner's attempt to bring this issue before this Court at this time is an attempt to circumvent the requirements that he exhaust state remedies and that the district court pass on his contentions. Accordingly, this Court should not consider the merits of Petitioner's claim.

However, even if Petitioner had exhausted state remedies and had presented this issue to the district court, a question would still arise as to whether this Court should reach the merits of Petitioner's argument.

In Stone v. Powell, ___ U.S. ___, 49 L.Ed.2d 1067 (1976), this Court held that where a State provides a defendant with an opportunity for full and fair litigation of a claimed Fourth Amendment violation, the defendant is not entitled to federal habeas corpus consideration of the same issue.

Underlying this conclusion is the rationale that

> ". . . Fourth Amendment violations are different in kind from denials of Fifth and Sixth Amendment rights in that claims of illegal search and seizure do not 'impugn the integrity of

> of the fact-finding process or challenge evidence as inherently unreliable;. . . (Kaufman v. United States, 394 U.S. 217 (1969)) at 224.'" Stone, supra at 1079.

While it is true that the present case does not deal with an allegation of a Fourth Amendment violation, it is also true that it does not deal with an allegation that the integrity of the fact-finding process has been impugned nor with an allegation of inherently unreliable evidence. To the contrary, there seems to be little dispute over the facts. Petitioner merely seeks to have this Court adopt his interpretation of his actions. Accordingly, Respondent submits that the rationale set forth in Stone, supra, should be extended to the present case and that Petitioner's claim, which has reached this Court through proceedings arising from a petition for writ of habeas corpus, should not be

considered due to its being an improper subject for federal collateral review.

Respondent additionally questions whether Petitioner's appeal in the Fifth Circuit should have even been considered on its merits.

As noted in the court's opinion, Petitioner failed to comply with the district court's order to post a bail bond in the amount of $5,000.00, as a condition of the stay of Petitioner's sentence pending appeal of the district court's denial of relief.

After Petitioner moved the district court to set bond but before it did so, the State courts deferred Petitioner's sentence due to health reasons, contingent on the posting of a $5,000.00 bond. Petitioner did post this bond.

Respondent submits that the staying of

Petitioner's sentence for medical reasons should be concluded to have no relation to the posting of bond required by the district court. In order to maintain an appeal in a federal court, the appellant must be within the control of the court, "either actually, by being in custody, or constructively, by being out on bail." Bohanan v. Nebraska, 125 U.S. 692 (1887). Petitioner's failure to post bond removed him from control of the federal court. The fact that he was under the constructive control of the State court does not change that fact; nor does any collateral medical reasons. Accordingly, Respondent submits that the court of appeals erred in considering Petitioner's arguments on their merits and that any consideration of the merits at this time would be to compound this error.

Even if Petitioner's argument is considered, however, it should be concluded to be without merit. Petitioner seeks to frame the issue in terms of resisting an unreasonable command of a police officer, but fails to allege any unreasonable command. It can certainly not be considered unreasonable for the officer to have required Petitioner to accompany him to the sheriff's office of the county in which the offense occurred, when Petitioner exceeded the speed limit without a driver's license and did not have the money to post bond. Nor can it be considered unreasonable to have asked Petitioner to roll down the car window or to get out of the car after he had been placed under arrest.

Petitioner notes that his wife refused to obey the officers' order that she drive the car across the median strip in order

to return to the sheriff's office. In considering that fact, it should be first noted that such a request is entirely reasonable when police officers are present to supervise the procedure. Further, it should be remembered that the refusal to obey this direction occurred after Petitioner had locked himself in the car and refused to roll down his window or to get out of the car. Thus, even if the officers' order is considered unreasonable, this fact is wholly immaterial as regards Petitioner's conviction of resisting arrest without violence. His actions prior to the order certainly constituted such resistance. The final point to be considered in analyzing the actions taken in response to this order is the fact that the person who refused to act according to the officers' instruction that the car be driven over

the median strip was not Petitioner, but Petitioner's wife. In fact, the officer made it clear that Petitioner was not to drive due to the fact that he did not have a license. Also, there is nothing to indicate that Petitioner had any misgivings as to the procedure, but just that he did not want to be inconvenienced by returning in the direction from which he came. Thus, even if the order is considered unreasonable and the failure to obey it is considered proper, the only conclusion that could be drawn would be that had Petitioner's wife been under arrest, she would not have been guilty of resisting arrest.

It is true that the action taken by the troopers in removing Petitioner from his car contrary to instructions from their supervisor was not the ideal procedure to

have followed. However, inasmuch as Petitioner's violation of the resisting arrest statute had already occurred when the troopers removed him from his car, the troopers' actions have no bearing on consideration of whether Petitioner's resistance was acceptable conduct. Petitioner's inclusion of these actions in his argument is merely an attempt to cloud the issue; the question remains whether Petitioner's conduct in locking himself in his car and refusing to come out or roll down his window was constitutionally protected resistance of an unreasonable order.

CONCLUSION

Respondent submits that based on the foregoing argument and authorities, this Court should conclude that the issue

Petitioner seeks to present is not a proper subject for consideration by this Court. Respondent further submits that even if the issue Petitioner seeks to raise is considered, the conclusion should be reached that Petitioner's contentions are without merit. Respondent therefore requests that this Court deny the Petition for a Writ of Certiorari and affirm the decision of the court of appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent in Opposition has been furnished this _____ day of December, 1976, to Honorable John P. Savage, 3121 West Wisconsin Avenue, Milwaukee, Wisconsin 53208 and Honorable Michael O. Bohren and Honorable Moses J. Zimmermann, 7635 W. Oklahoma Avenue, Milwaukee, Wisconsin 53219.

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APPENDIX

STATEMENT OF POINTS INVOLVED ON APPEAL

I

WHETHER THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE CONVICTION AND JUDGMENT IMPOSED

II

WHETHER THE CLOSING COMMENTS OF THE STATE PROSECUTOR WERE OF SUCH INFLAMMATORY AND PREJUDICIAL NATURE AS TO DEPRIVE THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL

III

WHETHER THE TRIAL COURT ERRED IN ALLOWING SUBSTANTIAL AMENDMENTS TO THE INFORMATION FILED AGAINST MR. DRESKE BY GRANTING LEAVE FOR THE STATE TO AMEND ON THE DAY PRIOR TO TRIAL WITHOUT PROVIDING NOTICE, AN OPPORTUNITY TO PLEAD ANEW, FACE ARRAIGNMENT AND DEFEND AGAINST THE SUBSTANTIALLY ALTERED CHARGES

IV

WHETHER THE SENTENCE IMPOSED AGAINST THE DEFENDANT WAS SO PATENTLY HARSH AND EXCESSIVE AS TO REQUIRE THAT IT BE VACATED AND SET ASIDE

V

WHETHER FLORIDA STATUTE §843.02 (1971) IS UNCONSTITUTIONAL ON ITS FACE BECAUSE THE VAGUENESS AND OVERBREADTH OF ITS TERMS VIOLATE DUE PROCESS GUARANTEES SECURED BY ARTICLE I, SECTION 9 OF THE DECLARATION OF RIGHTS OF THE FLORIDA CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

VI

WHETHER THE TRIAL COURT ERRED IN GIVING ITS INSTRUCTIONS TO THE JURY BY OMITTING OR FAILING TO GIVE A CHARGE ON ATTEMPT